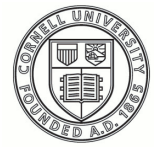

9-1-1988

State of New York Public Employment Relations Board Decisions from September 1, 1988

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from September 1, 1988

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VINCENT V. YACOBUCCI,

Charging Party,

-and- CASE NO. U-10165

DEPEW UNION FREE SCHOOL DISTRICT,

Respondent.

VINCENT V. YACOBUCCI, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Vincent V. Yacobucci (Charging Party) to the dismissal, as deficient, of his charge that the Depew Union Free School District (Respondent) violated unspecified sections of the Public Employees' Fair Employment Act (Act). In particular, the charge alleges that the Respondent refused his request for union representation at a January 7, 1988 meeting with the principal of the school in which Charging Party works as a teacher.

Among the grounds cited by the Director of Public Employment Practices and Representation (Director) for dismissal of the charge is the determination that it was untimely filed. Section 204.1(a)(1) of our Rules of Procedure requires that a charge be filed within four months of the alleged violation of the Act. There is no dispute that the act complained of occurred on January 7, 1988, and that the charge was filed on May 10,

1988. Based upon these undisputed facts, we find that the Director properly dismissed the charge as untimely.[1]

In view of the foregoing finding, it is unnecessary for us to address the charge on its merits to determine whether it is otherwise in conformity with the Act and our Rules.[2]

IT IS THEREFORE ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: September 1, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

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[1]Charging Party alleges in his exceptions that our Rules of Procedure provide for 122 days to file a charge. However, this assertion is rejected in view of the plain language of our Rule, and in the absence of any legal support for Charging Party's interpretation that 4 months means 122 days.

[2]In his exceptions, Charging Party asks this Board to keep his charge in open status until final determination by the New York State Court of Appeals of Rosen v. NYS Public Employment Relations Board, 125 A.D.2d 657, 20 PERB ¶7006 (2nd Dep't 1986). The Court of Appeals has since affirmed that decision, 72 N.Y.2d 42, 21 PERB ¶7014 (June 9, 1988). While we make no comment on the relevance, if any, of that decision to the substance of the instant charge, it has no bearing on the timeliness issue upon which our decision here rests.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMSTERDAM TEACHERS ASSOCIATION,

Petitioner,

-and- CASE NO. CP-146

ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF AMSTERDAM,

Employer.

MARTIN W. LEUKHARDT, for Petitioner

JOSEPH T. KELLY, for Employer

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Amsterdam Teachers Association (petitioner) to the dismissal by the Director of Public Employment Practices and Representation (Director) of a unit clarification petition as untimely. Petitioner filed its unit clarification petition on November 25, 1987, seeking a determination whether several department chairperson positions were within the bargaining unit it represents.

The Director dismissed the petition upon the ground that §201.2(b) of PERB's Rules of Procedure (Rules) precludes the filing of a unit clarification petition if the petitioner could

have filed a timely certification/decertification petition.[1/] Inasmuch as the employer, the Enlarged City School District of the City of Amsterdam, failed to consent to the filing of the petitioner's unit clarification petition, and as it is readily apparent that a certification/decertification petition could have been timely filed (the period for filing such petitions falls within the month of November for school districts, and the instant unit clarification petition was filed during that month),

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[1/]Section 201.2(b) of our Rules provides as follows:

> Notwithstanding [sections 201.3 and] section 201.4 of this Part, a petition may be filed by a public employer or a recognized or certified employee organization to clarify whether a new or substantially altered position is encompassed within the scope of an existing unit (hereinafter called a unit clarification petition), or to determine the unit placement of a new or substantially altered position (hereinafter called a unit placement petition). A unit clarification petition may be filed either upon the consent of the parties or upon a showing that petitioner could not have filed a timely petition pursuant to section 201.3 of this Part. A unit placement petition may only be filed upon a showing that petitioner could not have filed a timely petition pursuant to section 201.3 of this Part. The filing and processing of the petition shall be in accordance with sections 201.5(c), 201.7(a) and (d), 201.8, 201.9(a)-(f) and 201.11 of this Part. In determining the unit placement of any new or substantially altered position, the director shall consider whether the placement would be consistent with the criteria set forth in section 207 of the act. The director may decline to make any clarification or placement not otherwise consistent with the purposes or policies of the act. Exceptions to any determination of the director may be filed pursuant to section 201.12 of this Part.

The bracketed material was deleted and the underscored material added by virtue of an amendment to the Rules which became effective on May 8, 1987.

the Director correctly followed the plain language of our Rule in dismissing the petition.

By reason of the foregoing, the decision of the Director is affirmed and, accordingly, the unit clarification petition is hereby dismissed.

DATED: September 1, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNIONDALE TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-9062

UNIONDALE UNION FREE SCHOOL DISTRICT,

Respondent.

JOSEPH McPARTLIN, for Charging Party

RAINS & POGREBIN, P.C. (TERENCE M. O'NEIL, ESQ., and RICHARD KASS, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

In a charge filed November 21, 1986, the Uniondale Teachers Association, NYSUT, AFT, AFL-CIO (Association) alleges that the Uniondale Union Free School District (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it eliminated a "support skills" program taught by Association Vice-President Jacob Howard, in retaliation for his advising teachers that they were entitled to disregard an administrative directive to attend an after-school meeting scheduled for September 11, 1986.[1/]

[1/]The ALJ dismissed, without exception, an amendment to the charge which alleged a violation of the same subdivisions of the Act arising from the District's failure to pay Howard's salary in accordance with the parties' collective bargaining agreement. It is therefore unnecessary for us to address the issues raised by the amendment to the charge.

FACTS

The ALJ found that Howard suffers from certain disabilities associated with diabetes, including impaired vision (Howard is legally blind), and circulatory problems which have resulted in amputation of portions of his feet. In partial accommodation of Howard's medical problems, the District, in early 1983, following Howard's return from a disability leave, created a Support Skills Program for him to conduct, which involves tutoring small groups of students in mathematics who require extra assistance, but not full-scale mathematics remediation. Howard conducted this program during the second half of the 1982-83 school year, but was on disability leave for the 1983-84 school year period. Following his return to work, he conducted the Support Skills Program for the 1984-85 and 1985-86 academic years. In early September 1986, Howard was informed that his responsibilities for the 1986-87 academic year would again include the Support Skills Program. Thereafter, between September 5 and September 11, 1986, it came to the attention of Lois Small, principal of the Walnut School where Howard is employed, that Howard had advised other teachers in the school that they were under no contractual duty to attend an after-school meeting scheduled for September 11, which had been arranged by Small. The ALJ found, as fact, that in giving this advice, Howard was acting in his capacity as Association Vice-President, and was engaged in protected activity. The ALJ further found that Small and other District

representatives were angered and upset by Howard's advice, concluding that the absence of several members of the teaching staff at the Walnut School from the September 11 meeting was directly attributable to his advice. These findings are not contested before us.

On the following Monday, September 15, 1986, Small informed Howard that his Support Skills Program might not be continued because of space problems. The Program was subsequently abolished and Howard was temporarily assigned other duties in the Walnut School, which involved a substantial amount of walking and outside supervision of students, and which were made more difficult by Howard's mobility and vision problems. Howard was subsequently assigned to a different school with a full-time fifth grade teaching load, replacing a teacher who had been ill, beginning September 26, 1986.

The Support Skills Program, conducted by Howard for two and one-half years prior to the incidents giving rise to the charge, was held at the rear of the computer room at the Walnut School, during periods of time when the computer room was also being used for computer training.

In explanation of its actions in abolishing the Support Skills Program, the District asserted that it was compelled by space considerations to remove the Support Skills Program from the computer room as a consequence of the creation of a third kindergarten class in September 1986. The District asserted that

no other location in the school provided suitable space for the operation of the Support Skills Program, and it was for this reason that the program was abolished. The ALJ found the reason offered by the District to be pretextual, concluding that a more frequent dual use of the computer room than had existed theretofore did not provide a credible explanation for the District's actions, particularly since the computer room was subsequently utilized for other dual purposes, apparently without difficulty. Furthermore, no credible explanation was provided by the District as to why a particular space problem was created by the addition of a third kindergarten class for the 1986-87 school year, when in the two years prior to that year, three kindergarten classes were also conducted. The District had apparently hoped that it would be able to reduce the number of its kindergarten classes, but that hope was not realized as kindergarten enrollments took place during the spring and summer of 1986. In effect, then, there was no significant change in the space needs at the Walnut School between the 1985-86 and 1986-87 school years.

In its exceptions, the District asserts that the ALJ failed to take into consideration the District's "primary" explanation for Howard's reassignment, which it identified as the necessity for a fifth grade teacher to fill a position vacated by the illness of another teacher in another school. However, it is abundantly clear from the record that the decision to abolish the

Support Skills Program was made well in advance of any awareness of a need for a fifth grade teacher in another school, and accordingly can in no way constitute an explanation for the decision to abolish the Support Skills Program. Furthermore, after making reference to certain complaints about the program, Principal Small testified on direct examination as follows:

> Q. Regardless of these comments, however, had the space utilization problem not arisen, would Mr. Howard have stayed in that program for '86/87?
>
> A. Yes

In essence, then, the decision to abolish the Support Skills Program operated by Howard was made independently and in advance of the decision to place him in a fifth grade teaching position in another school. The ALJ clearly credited the testimony of Small in this regard and concluded that the placement of Howard in the fifth grade teaching position in another school was a subsequent development occasioned by the combination of a need to place him somewhere in view of the abolition of the Support Skills Program, and the intervening vacancy. This subsequent reassignment, however, does not constitute a justification for the elimination of the program run by Howard in the first instance.

DISCUSSION

It is our finding that the record adequately supports the findings of fact and credibility determinations made by the ALJ. Accordingly, the determination by the ALJ that the explanation

given by the District for its initial abolition of the Support Skills Program is pretextual is affirmed. Although the District argued in its exceptions that space problems indeed were created at the Walnut Street School by the restoration of the third kindergarten class in September 1986, the ALJ was not persuaded, as we are not, that these problems necessitated the abolition of the Support Skills Program. The ALJ further found that Howard's actions in advising teachers at the Walnut Street School that they had no contractual obligation to attend the September 11, 1986 meeting scheduled by Small, angered and upset representatives of the District to the extent that a letter was written to Howard so advising him, and the topic was the subject of discussion at several meetings between Association and District representatives following September 11.

The District also asserts in its exceptions that a finding of retaliation against Howard is erroneous as a matter of law in the absence of a finding that its actions were onerous to him or intended to be onerous. However, in raising this exception, the District focuses upon the assignment of Howard to the fifth grade class in another school, and not upon the initial decision to eliminate the Support Skills Program. It is conceded by the District that the creation of the Support Skills Program was in part an accommodation to Howard in recognition of his disabilities, particularly his visual impairment, which had, in years during which he taught regular classes, resulted in the

appointment of a teacher aide to assist him. In fact, however, in view of Small's testimony that the Support Skills Program would have continued for 1986-87 had it not been for the space utilization problem, there is no record evidence which would support the claim that, even without a space utilization problem, Howard would have been reassigned from the Support Skills Program to the fifth grade teaching assignment. Accordingly, the elimination of the Support Skills Program, which was found by the ALJ to have constituted an act of retaliation for protected activity, was deemed by the ALJ to constitute the adverse action complained of. We believe that a determination that the elimination of the Support Skills Program was adverse and onerous to Howard is implicit in the ALJ's findings. However, to the extent that an explicit finding may be appropriate, we so find.

The District also asserts that the remedy recommended by the ALJ of reinstatement of the Support Skills Program usurps the pedagogical role of the District. However, having found that the Support Skills Program was eliminated in retaliation against Howard for his protected activity, and having found the explanation provided by the District for the elimination of the program to be pretextual, the ALJ appropriately recommended restoration of the program.

Another exception made by the District to the ALJ decision and recommended order relates to the order of lost pay and benefits to Howard subsequent to the elimination of the Support

Skills Program. The District asserts that there is no evidence in the record, nor any claim by the Association, for back pay and benefits, and that to order such relief is accordingly improper, the burden of establishing entitlement to such relief resting with the Association. While we agree that, as a condition of payment, actual loss must be established, we construe the ALJ's recommended order as directing payment of back pay and benefits only if applicable. However, to make this point more clearly, we modify the language of the remedial relief in partial acceptance of the District's exception.[2/]

Except as modified herein, the decision and recommended order of the ALJ is affirmed, and IT IS HEREBY ORDERED that the District:

1. Offer Jacob Howard reinstatement to the "support skills" assignment under the conditions that existed prior to its abolition;
2. Make Jacob Howard whole for loss, if any, of pay and benefits suffered by reason of the removal of this assignment and his transfer from the date thereof to the date of offer of reinstatement with interest at the maximum legal rate;

[2/]Neither the forms for filing improper practice charges nor our Rules require a charging party to enumerate the specific relief sought. We construe our authority to effectuate the purposes and policies of the Act pursuant to §205.5(d) of the Act to include the authority to fashion appropriate relief, whether relief has been specifically requested or not.

3. Cease and desist from interfering with, restraining, coercing or discriminating against employees for the exercise of rights protected by the Act;

4. Sign and conspicuously post a notice in the form attached at all locations ordinarily used to communicate information to unit employees.

DATED: September 1, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify All employees in the unit represented by the Uniondale Teachers Association, NYSUT, AFT, AFL-CIO that the Uniondale Union Free School District will:

1. Offer Jacob Howard reinstatement to the "support skills" assignment under the conditions that existed prior to its abolition;

2. Make Jacob Howard whole for loss, if any, of pay and benefits suffered by reason of the removal of this assignment and his transfer from the date thereof to the date of offer of reinstatement with interest at the maximum legal rate;

3. Not interfere with, restrain, coerce or discriminate against employees for the exercise of rights protected by the Act.

Uniondale Union Free School District

.....

Dated..... **By**.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ELWOOD ALLIANCE OF TEACHING ASSISTANTS, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3201

ELWOOD UNION FREE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Elwood Alliance of Teaching Assistants, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All teaching assistants.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Elwood Alliance of Teaching Assistants, NYSUT, AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 1, 1988
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUILDING MATERIAL TEAMSTERS, LOCAL 282, IBT,

Petitioner,

-and- CASE NO. C-3394

TERRYVILLE FIRE DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Building Material Teamsters, Local 282, IBT has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All dispatchers (fire house attendants), mechanics and custodians.

Excluded: All other employees.

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FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Building Material Teamsters, Local 282, IBT. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 1, 1988
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ULSTER COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3411

COUNTY OF ULSTER and SHERIFF OF ULSTER COUNTY,

Joint Employer,

-and-

ULSTER COUNTY DEPUTY SHERIFFS LOCAL 373, COUNCIL 82, AFSCME, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Ulster County Deputy Sheriff's Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All employees of the Ulster County Sheriff's Department.

Excluded: Sheriff, Undersheriff, Lieutenants, Civil Administrator, Confidential Secretary and all other employees of the County of Ulster.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Ulster County Deputy Sheriff's Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 1, 1988
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LEROY D. SMITH,

Petitioner,

-and-

TOWN OF DRESDEN HIGHWAY DEPARTMENT,

Employer, CASE NO. C-3387

-and-

TEAMSTERS LOCAL 294,

Incumbent/Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All employees of the Town of Dresden Highway Department in the following titles: Laborer, Truck Driver-MEO, Working Foreman.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 1, 1988
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

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